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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-926

JAMES HORELICK,

Petitioner,

—v.—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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JAMES HORELICK,

Petitioner,

—v.—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

The petitioner James Horelick respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York entered in this proceeding on June 7, 1972, affirmed after motion to reargue on September 28, 1972.

Opinions Below

The opinion of the New York Court of Appeals, 30 N.Y. 2d 453, appears in the Appendix, *infra,* p. 1a.

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 7, 1972, and a motion to reargue was denied September 28, 1972. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Statutes and Constitutional Provisions

39 McKinney's Consolidated Laws of New York §140.10, provided:[1]

> *Criminal trespass in the second degree*
>
> A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders.
>
> Criminal trespass in the second degree is a class B misdemeanor. L. 1965, c. 1030, eff. Sept. 1, 1967.

39 McKinney's Consolidated Laws of New York, §205.30 provides:

> *Resisting arrest*
>
> A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from effecting an authorized arrest of himself or another person.
>
> Resisting arrest is a class A misdemeanor. L. 1965, c. 1030, eff. Sept. 1, 1967.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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[1] This section has since been retitled "Criminal Trespass in the Third Degree," but is otherwise unchanged.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

Whether a public school teacher is denied due process of law when he is convicted of trespassing in the school where he is assigned to teach on an occasion when there is a strike in progress, and he has an express privilege to be present and teach.

Whether a public school teacher is denied due process of law by a conviction for trespassing in the school where he is assigned to teach, under an *ex post facto* change in the trespass law applicable to his case.

Whether a public school teacher is denied due process of law when he is convicted of criminal trespass after being given a directive on one day from the Board of Education that a school was open if "even one teacher would want to teach," and being arrested the following day for entering the school.

Whether it is an interference with academic freedom under the First Amendment, when a statute ostensibly di-

rected to punishing criminal trespass is used by adherents of one academic faction to punish another, in derogation of an express privilege to be in a public school.

Whether it is a denial of due process of law for a public school teacher to be convicted of non-violently resisting an arrest for trespass which has been provoked by an express privilege given by his Board of Education to enter the school.

Statement of the Case

The petitioner, James Horelick, was a teacher in the New York City public school system at the time of the major teachers' strike in that City, during the Fall of 1968. It was "concededly an illegal strike" (Appendix p. 10a).[2] As part of a group of teachers opposed to that strike, he went to the school to which he was ordinarily assigned, Washington Irving High School (Appendix p. 10a), on March 17, 1968. The day before, John Doar, the newly-appointed President of the Board of Education, the highest authority in the governance of the City's schools, had announced in the strongest terms the decision of the Board that the schools were to be kept open. The dissenting opinion in the New York Court of Appeals summarizes his testimony accurately (Appendix p. 8a):[3]

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[2] The Appendix to this petition sets forth the opinion in *People v. Adickes*, 30 N.Y.2d 461, the companion case to this, because it contains a fuller statement of facts.

[3] The documents set forth in the appendix, particularly Defendants' Exhibit C, Appendix p. 17a are in accord. The document relied on by the majority of the New York Court of Appeals, with the ambiguous phraseology that it was issued "after the disorders and violence of October 17" (Appendix, p. 18a) was in fact promul-

John Doar, who on October 16, 1968 and immediately thereafter was the president of the board of education, testified that the board had voted to keep the schools open during the then current teachers' strike and the board also had agreed on the text of a "directive" which he was authorized by the board to publish.

This directive, he testified, was addressed to the superintendent of schools, "to the employees of the school," to the students, to their parents and to the citizens of the city. The Assistant District Attorney on the trial expressly conceded, in answer to the court's question, that the directive "was formulated by a majority of the Board at a duly constituted meeting."

Mr. Doar also testified unequivocally that the schools were never closed by the board during the strike, either informally or formally, and that "some of the employees of the Board were illegally, without authority closing the schools and locking them."

The directive as published was "to tell publicly employees of the Board and custodians and [that] we want to make it clear even if one teacher would want to go to school to teach that the school would be open."

It was thus unequivocally clear that the Board of Education intended the schools to be open and teachers to be teaching on October 17, 1968. That morning, the teachers who wanted to teach instead of striking, obtained a letter from the District Superintendent appointing one of them (not the petitioner) "teacher-in-charge." The principal and the custodian-engineer, who were participating in the strike,

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gated on October 20, 1968, after all the arrests in this case were over. It did not, in any case, purport to destroy existing rights to be in the schools.

declined to honor the letter, and petitioner Horelick, with the authorization of the teacher-in-charge, simply slid open an unlocked window and entered.[4] Upon the orders of the custodian-engineer, he was arrested, and charged with criminal trespass and resisting arrest under the New York Penal Law, 39 McKinney's Consol. Laws of N.Y. §§140.10, 205.30. The prosecution evidence for the charge of resisting arrest is summarized by the dissenting opinion in the New York Court of Appeals (Appendix p. 8a).

The petitioner was arrested again on the evening of October 19, 1968, in the same school on an occasion when the school was open for a concert. The same license and privilege of the Board of Education applied on that night as on the earlier occasion; if there was a legal difference, it was that the petitioner simply walked in, without benefit even of sliding open a window. Petitioner was again charged with criminal trespass.

Mr. Horelick was tried in the Criminal Court of the City of New York without a jury, together with a co-defendant, Sandra Adickes, who was accused of interfering with his arrest of October 17, 1968. Both were found guilty of all the charges, and the petitioner was sentenced to a fine of $500 or 60 days. After serving a few days, he was released on a certificate of reasonable doubt.

Mr. Horelick appealed upon the ground that he had a license or privilege to be in the school, and that to apply the trespass statute to him would deny him due process of law

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[4] The opinion of the majority below mentions "force," and even "riot." There is, however, not one iota of evidence in connection with the entry to the school apart from the non-violent opening of a window.

and academic freedom. His conviction was affirmed in the New York Court of Appeals on June 7, 1972 by a divided vote of four to three, 30 N.Y.2d 453 (Appendix p. 1a), while Sandra Adickes' conviction was reversed by the same margin of one vote (30 N.Y.2d 461). The New York Court of Appeals held that the case was controlled by the ancient law of forcible entry and detainer, which it assimilated to the law of trespass. Petitioner made a motion to reargue in the New York Court of Appeals, upon the ground that the decision of that court had changed the law of trespass so radically as to make it unpredictable, and further had applied it retroactively, as well as upon the ground that to convict the petitioner of trespass upon such a novel theory, when he had a privilege to be in the school, was an impermissible form of entrapment. That motion was denied on September 28, 1972, without opinion. This petition seeks review of the decision of the New York Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

The case raises issues of wide application.

Strikes of public employees, far-reaching in their effects, occur with increasing frequency in our society. The strike of public school teachers in New York City during 1968 was among the most bitter of these many conflicts, see Gittell, *Confrontation at Ocean-Hill Brownsville* (1969); Mayer, *The Teachers' Strike, New York, 1968* (1969). The conviction of petitioner, emanating from that strike, presents problems of due process of law which form a paradigm for other, similar conflicts.

It is inevitable in such conflicts, that one side should be temporarily in control of public facilities, and should try to exclude its adversaries. If the privilege or license to be in his place of work which would ordinarily attach to a public employee, or any special reinforcement of that privilege, such as there was in this case, can be granted or revoked at the pleasure of one faction or another, a chaotic situation of discriminatory arrests, together with convictions without basis in precedent, must result. To permit the conviction of the petitioner school teacher for trespassing to stand under the circumstances of this case, creates danger of a situation in which the rule of law is weakened because it is most unpredictable just at the times of social conflict when it is most needed.

This case has dimensions even beyond the recurrent problem of the public employees' strike. The strike during which Mr. Horelick was arrested was no ordinary one. It was a strike of public school teachers, and was, moreover, bound up with conflict over changes in educational policy. The strike occurred partly because of disagreements over the transfer of some governing functions in the New York City public school system to so-called "community boards." Members of the teaching profession, and even members of the union, disagreed over the wisdom of the policies advanced by the Board of Education, and thus, even over the advisability of a strike.

It is in this context that the majority of the New York Court of Appeals said, of the petitioner's conviction, that it was "... regrettable that a school teacher should suffer a penal sanction for conduct motivated by an ideology, even if sincere" (Appendix p. 5a). The phrase has reference to the fact that petitioner was one of those teachers

who did not favor the strike, and who therefore was determined to go and teach on October 17, 1972, the day after the Board of Education announced that the schools were to be open "if . . . one teacher would want to go to school to teach." An arrest and conviction for a trespass the day after that announcement could not but have an enormous *in terrorem* effect upon those who did not subscribe to the strike or the educational policies which in part motivated it.

If a state trespass statute can be construed, as the one in this case has been, to justify the arrest and conviction of a teacher for going into the school where he works, when he has a *bona fide* reason to believe he has a right to be there, that trespass statute is excessively vague. It is vague *a fortiori* when, as here, precedents are changed so as to make the meaning of the statute unpredictable. See, e.g. *Winters* v. *New York*, 333 U.S. 507, 509 (1948). As authoritatively construed, the New York State criminal trespass statute may be used by one academic faction, as it was in this case, to punish a member of another faction. This Court said, of the principles of academic freedom, in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957):

> "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

Here, the threat of a trespass arrest for trying to teach under conditions displeasing to a lawless faction casts a cloud over academic freedom. The application of the trespass statute to a case such as the petitioner's creates a continuing threat of prosecution to the dissenting teacher, such that the incidence of the statute cannot be predicted; and it thus infringes the First Amendment.

In this case, a public employee has been punished for acts lawful at the time they were committed; more than that, a criminal statute has been used by one academic faction against another. It is of great importance that a precedent so disturbing to due process of law and academic freedom not be permitted to stand.

II.

The decision of the New York Court of Appeals is in conflict with a decision and with principles established in decisions of this Court on substantial issues of constitutional law.

1. *Ex Post Facto Law.*

In *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964), this court held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law," 378 U.S. at 353, and denies persons convicted under such an interpretation due process of law. The *Bouie* case "arose out of a 'sit-in' demonstration . . . in Columbia, South Carolina," 378 U.S. at 348. Petitioners, two Negro college students, sought service at a lunch counter open to the public, but reserved for whites, and were arrested and convicted of trespass. The South Carolina trespass statute, as written and authoritatively interpreted, applied only to entry upon the lands of another after notice prohibiting the entry, and clearly not to remaining on those lands.

The Court held that "by applying such a construction of the statute . . . , the State has punished [Petitioners] for conduct that was not criminal at the time they committed it,

and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." 378 U.S. at 350.

The present case differs from *Bouie* only in the respect that different propositions in the criminal law of trespass are involved. Here, the petitioner had a directive from his Board of Education, which, in the words of the dissenters below amounted to a "right—indeed [a] duty," 30 N.Y.2d at 459, to enter the school. Those who purported to hold the school closed were engaged in an illegal strike (Appendix, p. 10a). Even the underlying circumstances of the two cases are similar: in *Bouie,* the petitioners were basically protesting racial segregation in South Carolina; in this case, the petitioner sought to teach in defiance of a strike, the aims of which he did not share. In both cases, the decisions of the highest courts of the state, because of their unpredictable changes in applicable state law, have had the effect of intimidating other persons similarly situated.

It is as clear under New York state law that petitioner's claim of right from the Board of Education shielded him from a valid conviction for trespass as it was in the *Bouie* case that merely remaining in the premises could not sustain a conviction under South Carolina law. Petitioner was charged under Section 140.10 of the New York State Penal Law, 39 McKinney's Consol. Laws of N.Y. §140.10, which penalizes a person who "knowingly enters or remains unlawfully in a building." It is established law, in New York, in the words of the dissenters below (30 N.Y.2d at 460):

> "The Appellate Division in *People* v. *Barton,* 18 A.D.2d 612, 234 N.Y.S.2d 263 noted that a colourable claim of right—even if it were mistaken—negatives the criminal

> intent necessary for a conviction under Section 2036 of the Penal Law [predecessor to §140.10]. (See, also, Judge Andrews' dictum on a legally mistaken entry on land in good faith in *People* v. *Stevens*, 109 N.Y. 159, 163, 16 N.E. 53, 54.)"

The definitional section of the New York Penal Law regarding trespass defines the term in a way which is fully consistent, 39 McKinney's Consol. Laws of N.Y. §140.00(5): "A person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so." Under state law, the directive of the Board was undeniably such a license or privilege.

The majority of the New York Court of Appeals did not outright reject all this, but instead sought to sidestep it by drawing upon the ancient law of forcible entry of detainer. As the majority of the New York Court of Appeals put it:

> " . . . the issue is whether the resort to self-help by 'breaking and entering' in the classic sense, is permitted, an issue laid to rest long ago by successive and ancient statutes relating to forcible entry and detainer (see Real Property Actions and Proceedings Law, §853; former Penal Law, §2034, and source annotations; as to use of force against the person to gain entry, see Model Penal Code [Tent. Draft No. 8, May 9, 1958], §3.06, esp. subds. [2], [3], and [6], incl. Comments, esp. at pp. 42-45; Restatement, 2d, Torts, §88; Scope Note, at pp. 158-159; Anno., Right to Use Force, 141 A.L.R. 250, esp. 276)."

Under New York law, the forcible entry and detainer issue was settled in favor of the petitioner with as much clarity

as the issue of license or privilege. Opening a window to obtain entry simply was not a forcible entry. As the New York Court of Appeals itself most recently said in *Drinkhouse* v. *Parka Corp.*, 3 N.Y. 2d 82, 91 (1967):

> "... it is well established that it applies only where the force employed to oust a tenant is unusual, tends to bring about a breach of peace, and the entry is with a strong hand, or by a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life and limb under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession (Fults v. Munro, 202 N.Y. 32, 95 N.E. 23, 37 L.R.A., N.S., 600; Arout v. Azar, 219 App. Div. 260, 219 N.Y.S. 431). Mere trespass does not give rise to such an action, even when it is accompanied by 'wrenching off the lock' (Bach v. New, 23 App. Div. 548, 48 N.Y.S. 777, 778; Schrier v. Shaffer, 123 App. Div. 543, 107 N.Y.S. 1107)."

That statement of the law was neither new nor unusual: it had been the common law both in the United States and England. See 2 Anderson, *Wharton's Criminal Law and Procedure*, Ch. 35 §869 (1957); Hawkins, *Pleas of the Crown*, Ch. 28 Subd. 3 §26 (1824 ed.).

The New York Court of Appeals has so seriously distorted the law, in stretching to affirm the petitioner's conviction, that the consequences are absurd. The law now is, that a man who has a right to be in a premises, may be convicted of crime if he slides open an unlocked window to obtain access!

The importation of standards at the appeal level, designated "forcible entry and detainer," which in fact bear no relation to the applicable law under that rubric or any other, affects the petitioner in two ways. The change made it impossible for him to conform his behavior to the law before his arrest, and further made it impossible for him adequately to defend himself at the trial. He could not have predicted that he would be arrested despite his privilege, or tried under a newly devised set of standards of conduct, designated under an older rubric. Thus petitioner did not receive "fair notice," either in the sense of a predictable rule of law, or for purpose of preparing a defense.

2. *Entrapment and Estoppel.*

The directive of the New York City Board of Education opening the schools "if even one teacher would want to go to school to teach" was issued just the day before petitioner first appeared at his school, entered it and was arrested. Thus the government gave Mr. Horelick a license, encouraging him to go to school, and then arrested him for it. This Court has held that such conduct by the State constitutes a kind of entrapment which denies the individual due process of law. In *Cox* v. *Louisiana,* 379 U.S. 559 (1965), petitioner Cox was charged with demonstrating in or near a courthouse with the intent of obstructing justice. The facts showed that public officials had permitted the petitioner and others to demonstrate near the courthouse. This court reversed the conviction, saying (379 U.S. at 571):

> "... after the public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could 'would be to sanction an indefensible sort of entrapment by the State—convict-

ing a citizen for exercising a privilege which the state had clearly told him was available to him' (citation omitted). The Due Process Clause does not permit convictions to be obtained under such circumstances."

So here, the Board of Education had clarified the issue of who had the privilege of being in the schools. Having given petitioner the privilege, prosecution was subsequently impermissible under the Due Process Clause. See also *Raley* v. *Ohio*, 360 U.S. 423 (1959); Note, *Applying Estoppel Principles in Criminal Law*, 78 Yale L.J. 1046 (1969).

3. *Resistance to Unlawful Arrest.*

Petitioner's arrest of October 17, 1968 was ordered by the custodian of the school, and occurred at a time when he knew he had a privilege to be in the school. His arrest was patently unlawful and could not but appear to be discriminatory as well. This court has held that a person has a right to refuse an unlawful order. *Wright* v. *Georgia*, 373 U.S. 284 (1963); *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965); *United States* v. *Di Re*, 332 U.S. 581, 594 (1948). In the present case, the right has a dimension even beyond the right protected in the above cases. The privilege, known to the petitioner, to be present in the school, necessarily made him conscious of exactly the ways in which the arrest was unlawful and discriminatory. The authorities provoked petitioner's resistance, if there was any, in the same way they provoked his entry into the school. A conviction for that resistance constitutes a denial of due process under *Cox* v. *Louisiana*, *supra*, precisely because the authorities provoked the resistance. See Chevigny, *The Right to Resist an Unlawful Arrest*, 78 Yale L.J. 118, 1147-1149 (1969).

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the decision of the New York State Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX

Opinion of New York State Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

App. T. 1. No. 153. 72

THE PEOPLE &c.,

Respondent,

vs.

JAMES HORELICK,

Appellant.

BREITEL, J.:

Defendant Horelick stands convicted of criminal trespass in the second degree, a Class B misdemeanor (Penal Law, § 140.10, prior to amdt. L. 1969, ch. 341) and for resisting arrest (*id.*, § 205.30). He has been sentenced to a fine of $500 or to serve 60 days imprisonment if the fine is not paid.

Both crimes were committed in resisting the exclusion of Horelick and other school teachers from a closed, locked high school, and the ensuing arrest by police officers. The events occurred during an emotional and incipiently riotous confrontation between factions during a so-called citywide teachers' strike. The issue is not the lawfulness of the closing of the school, on which there may be divergent views, but the use of self-help to enter the school and then additional force to prevent arrest. Put another way, the issue is whether the resort to self-help by "breaking and entering" in the classic sense, is permitted, an issue laid to rest

long ago by successive and ancient statutes relating to forcible entry and detainer (see Real Property Actions & Proc. Law, § 853; former Penal Law, § 2034, and source annotations; as to use of force against the person to gain entry, see Model Penal Code [Tent. Draft No. 8, May 9, 1958], § 3.06, esp. subd. 2, 3, and 6, incl. Comments, esp. at pp. 42-45; Restatement, Torts, Second, § 88, Scope Note at pp. 158-159; Ann., Right to Use Force, 141 A.L.R. 250, esp. 276).

Stating the issue thus, and it is stated correctly, the convolutions of theory and conflicting pronouncements by the embattled school authorities whether the schools were to be open or closed are immaterial. So are, ultimately, analyses related to claims of right by owners and others entitled to rights of entry under property law. Even such property rights, by still being subject to restrictions on the use of force, emphasize the policy against self-help by force or other illegal methods.

There is no doubt that the President of the Board of Education, and perhaps the Board, had directed that the schools be kept open. It is equally undoubted that school principals are the immediate authorities in charge of their school buildings, with power (the exercise of which is reviewable by their superiors) to direct schools to be open or closed. Safety of students and teachers requires no less authority. There was also a prescription for opening schools improperly closed and that prescription was not followed by defendant Horelick or his associates.*

---

* Paragraph 2 of the instructions read:

"In the event that the school cannot be opened because the custodian refuses to open the school, or is not present, call the borough custodian headquarters—as a second step, call the office of Mr. Hudson and Mr. McLaren."

The principal in question, rightfully or wrongfully, had directed that the high school be kept closed. The school custodian, subject to the principal's command, and in charge of the school building while it was closed, kept it closed. It is irrelevant whether they did so out of factional motivation or because of fear that this high school, if opened, would be out of control. For their judgment and action, their conduct is reviewable elsewhere, and not by the subordinate school teachers, individually or as a body.

(Significantly, after the disorders and violence of October 17th, the Superintendent of Schools issued a directive on the procedure for opening schools, which included the following:

"1. Try to obtain key from the school principal.

2. Contact area office for:

a) possible assistance;

b) key to school if available.

3. District Superintendent try to obtain key from custodian or from police precinct by asking a patrolman to come with the key [This is subject to negotiation being carried on with Commissioner Leary and based on the assumption that the custodian did not change the locks.]

Only the District Superintendent or the school's principal or the person designated as acting principal known to the Police Precinct may arrange for a 'legal' break-in by:

a) getting a locksmith;

b) breaking lock or window in the presence of a policeman. They will permit this only in the

presence of the District Superintendent or regularly assigned principal or designated acting principal.")

The fact is that on October 17, 1968 the school building was closed. A group of teachers, including defendant Horelick, planned a take-over of the building, surreptitiously if possible. Horelick gained access to the building through a basement window and was discovered by a member of the custodial staff. A struggle ensued during which Horelick tried to open the locked doors of the school to admit his allies, who were not necessarily teachers or students. A police officer was called and Horelick resisted the arrest by physical efforts, trying to kick the policeman. It was when he was being placed in the police car that the codefendant Adickes played her part in repeatedly opening the police car door. While this was going on, a crowd of about 60 people, sympathetic to the open school effort, surrounded the police car.

To resolve the issue on whether the school was properly closed or not is, as has been already said, immaterial. The issue turns on whether the affected teachers had a "license" or "privilege" to open the school by surreptitious entry and force, and not whether they had a right or duty to be in the school (Penal Law, § 140.00, subd. 5). Since only force or some other illegal method could be used to effect an entry which would inevitably provoke counter-force (in this case, even riot), the remedy to open the school was by seeking the assistance of superiors who had the power (and perhaps the duty) to open the school. Even they were not entitled to use force, but they, if they wished to persist in their purpose to open the school, had to resort to the assistance of the police, and beyond that the courts. Whether one

views the problem from the position of the "striking" teachers or their antagonists it is not tolerable that the controversies be resolved in the streets or the school corridors, instead of under law, and in the courts, if necessary.

In this context, it is of less consequence, and it is even sadly regrettable, that a school teacher should suffer a penal sanction for conduct motivated by an ideology, even if sincere. It would be of the gravest consequence, however, to suggest that self-help force may be condoned or justified by an inapplicable analysis whether the school "lawfully" should have been open or closed.

Accordingly, the order of the Appellate Term should be affirmed.

Bergan, J. (dissenting):

The defendant's conviction for criminal trespass (Penal Law, § 140.10) and for resisting arrest (Penal Law, § 205.30) must be reversed on the ground his guilt was not established beyond a reasonable doubt.

The highest legal authority over school property in the school district of the City of New York is vested in the Board of Education (Education Law, art. 52, §§ 2550, 2554 [4]). The custody and control of "all" school property is there. (See, also, generally on school property, Education Law, § 414.)

John Doar, who on October 16, 1968 and immediately thereafter was the President of the Board of Education, testified that the Board had voted to keep the schools open during the then current teachers' strike and the Board also had agreed on the text of a "directive" which he was authorized by the Board to publish.

This directive, he testified, was addressed to the superintendent of schools, "to the employees of the school board",

to the students, to their parents and to the citizens of the city. The assistant district attorney on the trial expressly conceded, in answer to the court's question, that the directive "was formulated by a majority of the Board at a duly constituted meeting".

Mr. Doar also testified unequivocally that the schools were never closed by the Board during the strike, either informally or formally, and that "some of the employees of the Board were illegally, without authority closing the schools and locking them".

The directive as published was "to tell publicly employees of the Board and custodians and [that] we want to make it clear even if one teacher would want to go to school to teach that the school would be open".

The People argue that Gerard Oak, principal of Washington Irving High School, had general authority over that school under the by-laws of the Board of Education, and had ordered it closed on October 17 when defendant entered the school. They also note that Nathan Brown, executive deputy superintendent of schools, had issued under the authority of the Board a procedure for opening a school when "the custodian refuses to open the school".

But it is clear from Mr. Doar's testimony that the Board of Education's directive the schools be open "if there is only one teacher going to the school" was not affected by either of those circumstances as of the time material to this prosecution. The normal and routine authority of the local principal to close the Washington Irving High School under the by-laws was superseded by the Board's contrary directive. Mr. Doar made it explicit that the procedure governing "authority of persons to open the schools" came "not until after" the directive to all teachers and employees to come to the schools had been issued.

If there is confusion in the sequential exercise of authority under the Board's action here, it is a confusion which does not help the prosecution to establish beyond a reasonable doubt that this defendant teacher "knowingly" entered or remained "unlawfully in a building" (Penal Law, § 140.10).

Mr. Horelick was assigned to this school and his right—indeed his duty under the Board's directive—was to be there in spite of an illegal strike. As already noted the highest authority in the school system had published a directive advising that the schools would remain open and inviting teachers to come to work.

Actually, the Board regarded the closing of schools by custodians as "unlawful". That defendant came in through a window is not remarkable in the light of the hostility of custodians who were wrongfully closing the school. The prosecutor, therefore, has not established beyond a reasonable doubt that defendant was "wrongfully" in the school in which he was assigned to teach and both prosecutions on this charge are essentially similar.

Even if the legal right of defendant to be in the school were far more debatable than it is, a case would not be made out. The Appellate Division in *People* v. *Barton* (18 A D 2d 612) noted that a "colourable claim of right—even if it were mistaken—negatives the criminal intent necessary for a conviction under section 2036 of the Penal Law [predecessor to § 140.10]". (See, also, Judge Andrews' dictum on a legally mistaken entry on land in good faith in *People* v. *Stevens,* 109 N. Y. 159, 163.)

The decision in *People* v. *Williams* (25 N Y 2d 86), relied on by the People, is quite different, based as it was on proof of obstruction of public officers in discharge of duty under an entirely different kind of statute (former Penal Law,

§ 1851). The prosecution here for criminal trespass is sharply distinguishable, and it is enough to say that it is not established beyond a reasonable doubt.

Nor is the prosecution for resisting arrest (Penal Law, § 205.30) established beyond a reasonable doubt. When the testimony of the arresting officer, Patrolman John Van Houten, is analyzed, it is manifest that defendant put his hand up as though protesting the arrest without touching the officer. Although the officer initially testified that defendant "kicked at me", he altered this on cross-examination to say "attempted to kick me". When his actual observation was sought he said merely that defendant "moved his leg" toward him.

The remaining proof bearing on an attempt to prevent arrest consisted of the officer's testimony that defendant was "Sort of twisting his body around, waving his other arm [the one not handcuffed]" and "More or less sort of wiggling his arms" and "kept putting his feet out in front of him" and "on the side of the radio car".

This does not actually establish the defendant's guilt for attempting to "prevent" the officer from "effecting" an authorized arrest under Penal Law section 205.30 (see *People* v. *Adickes,* decided today). Nor is this kind of minor objection to arrest a fair basis for a separate prosecution on a distinct crime.

The order should be reversed and the charges dismissed.

* * * * *

Order affirmed. Opinion by Breitel, J. All concur except Bergan, J., who dissents and votes to reverse and dismiss the information in an opinion in which Fuld, Ch. J., and Gibson, J., concur.

Opinion of New York State Court of Appeals in Companion Case

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

SANDRA ADICKES,

Appellant.

Court of Appeals of New York.

June 7, 1972.

Eleanor Jackson Piel, New York City, for appellant.

Frank S. Hogan, Dist. Atty. (Robert A. Goldschlag and Lewis R. Friedman, New York City, of counsel), for respondent.

BERGAN, Judge.

Following upon the arrest of a teacher, James Horelick, for trespass on school property, appellant Sandra Adickes, also a teacher, was arrested for interfering with the arrest (see People v. Horelick, 30 N.Y.2d 453, 334 N.Y.S.2d 623, 285 N.E.2d 864, decided herewith). The incidents grew out of a teachers' strike in New York City.

The information which is the basis of the prosecution of Miss Adickes was sworn to by Patrolman John Van Houten. It alleges that defendant "attempted to prevent him from effecting an authorized arrest of another person".

The statute on which the prosecution is grounded (Penal Law, § 205.30) provides, so far as here relevant, that a person is guilty of resisting arrest when he "intentionally" attempts to prevent a peace officer from "effecting" an "authorized arrest".

Miss Adickes, who was employed at Washington Irving High School on West 16th Street, belonged to a group of teachers opposed to the teachers' strike in October, 1968, which was concededly an illegal strike. She went to the school on October 17 following an announcement from the Board of Education of the City of New York that the schools were open despite the strike and asking teachers to appear for duty.

She was in a group of teachers and pupils gathered outside the school building when Mr. Horelick, who also belonged to a group opposing the strike and who had been arrested in the school for illegal trespass, was being taken out of the building in custody and placed in a police car.

The arresting Patrolman Van Houten testified on direct examination by the prosecutor that after he placed Horelick in the police car "I noticed a door being open [sic] on the other side". He said he noticed Miss Adickes "had the door of the radio car open and she was pulling Horelick towards the door. * * * I just * * * shoved Miss Adickes in the car. I told her she was under arrest." On cross-examination the witness testified he saw defendant "touch" Horelick "with both hands".

Thus the bare record as developed contains both the equivocal statement that the defendant "touched" the already arrested Horelick and the conclusory expression that she "started to pull him" toward the door.

The weakness of this proof as a foundation to meet the People's burden of showing beyond a reasonable doubt that

defendant intended to "prevent" the policeman from "effecting an authorized arrest" (Penal Law, § 205.30) is based on the fact that the trial court did not find defendant attempted to pull Horelick out of the car to "prevent" the arrest, or even that she "touched" Horelick. Its specific finding of her physical act is merely that she "did reach in the car".

The essential part of the factual finding is stated this way: "The Court finds the door was opened two times, or possibly three times. The Court further finds she did reach in the car and whether she did touch the defendant or not, her efforts were completely consistant [sic] with attempting to desist [sic] Horelick from the affection [sic] of the arrest, which would constitute a resisting arrest under 205.30 of the Penal Law. Her conduct cannot go unnoticed and I find it to be violative of the Laws of the State of New York. I deny her motion."

This factual finding, then, shows no act of interference except the opening of a door and reaching into a police car. These narrowly circumscribed acts are so equivocal and uncertain as to require this court to hold that defendant's guilt of intentionally attempting to prevent a peace officer from effecting an arrest is not established beyond reasonable doubt as a matter of law.

It should be added that if other proof in the case is considered in context, this defendant had a discussion with Patrolman Van Houten in which, protesting Horelick's arrest, she said that if he was arresting her fellow teacher he should arrest her, too, and he responded by arresting her.

Certainly such a protest should not be deemed a crime. On the view of the evidence most favorable to the People, and under the findings of the court addressed to the record, guilt was not established beyond a reasonable doubt and

accordingly there should be a dismissal of this debatable prosecution.

The order of the Appellate Term should be reversed and the information dismissed.

BREITEL, Judge (dissenting).

It is unnecessary to repeat the views expressed in the companion majority opinion affecting the codefendant Horelick; they apply also to the defendant Adickes.

The remaining issue is whether Miss Adickes' conduct amounted to attempting to prevent the arrest of defendant Horelick. That arrest the court is simultaneously holding proper as it does the conviction of Horelick for the crimes of trespass and resisting his own arrest.

One may take Miss Adickes' direct testimony to determine what she admitted doing: "And the policeman came and pushed me away from the door [of the patrol car] and I opened it again and again I said I want to go with him. I want to go with him. And I may have said one or two other things. I remember saying that. Then I was pushed away again and then the third time I opened the door I was—or I moved towards the door I was pushed in by a policeman and after a few minutes Mr. Horelick was in the car and there was also a boy in the car."

The incident occurred in the midst of a crowd of about 60 people, while defendant Horelick, his clothes already in disarray, was wriggling and kicking his feet toward a policeman as he struggled to prevent his detention. The police officer testified that when he placed Horelick into the patrol car through one door, defendant Adickes opened the other door and pulled Horelick toward the opened doorway. It was then, the officer said, that he walked around the car

and arrested Miss Adickes by pushing her into the patrol car. His testimony was accepted by the trial court and the Appellate Term, and that finding of fact is supposed to be beyond review in this court.

True the trial court concluded it was unnecessary to determine whether Miss Adickes "touched" Horelick, but it found that she reached into the patrol car and that her efforts were consistent with an attempt to resist the detention of Horelick.

At the very least, Miss Adickes' trial testimony admits delaying the arrest and, therefore, interfering with it. The prosecution's evidence and the trial court's finding of intent established the essential element that she tried to prevent the detention.

Accordingly, the order of the Appellate Term should be affirmed.

FULD, C. J., and BURKE and GIBSON, JJ., concur with BERGAN, J.

BREITEL, J., dissents and votes to affirm in a separate opinion in which SCILEPPI and JASEN, JJ., concur.

Order reversed, etc.

Order Denying Motion for Reargument

STATE OF NEW YORK

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-eighth day of September A.D. 1972.

Present,

Hon. Stanley H. Fuld,
Chief Judge, presiding.

1 Mo. No. 709

The People &c.,
Respondent,

vs.

James Horelick,
Appellant.

A motion for reargument of the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is denied.

A copy

/s/ Gearon Kimball
Deputy Clerk

(Seal)

Exhibits Relevant to Issue of Trespass

DEFENDANT'S EXHIBIT A

Board of Education
City of New York
Office of District One
165 Norfolk Street
New York, N. Y. 10002

Theresa G. Rakow
District Superintendent

Telephones:
ORegon 4-3780-1-2

October 17, 1968

To Whom It May Concern:

Mr. Edward Williams is authorized to be Teacher-in-Charge of W. I. H. S. provided no other supervisor from this school reports for duty.

This Is by Order of the Board of Education.

/s/ Jack Landman
Supt. Jack Landman

This is authorization for a locksmith to work in Washington Irving H. S.

/s/ Frances O'Brien
Chairman, D.O. 1

DEFENDANT'S EXHIBIT B

BOARD OF EDUCATION
OF THE CITY OF NEW YORK
110 LIVINGSTON STREET
BROOKLYN, N. Y. 11201

NATHAN BROWN
EXECUTIVE DEPUTY SUPERINTENDENT OF SCHOOLS

October 17, 1968

TO ALL DISTRICT SUPERINTENDENTS

The instructions of the Board of Education and the Superintendent of Schools are as follows:

1. Wherever a competent teacher of a school appears and is willing to assume responsibility for supervision of the school, such a teacher should be designated to open the school. Please do this in writing on official stationery, addressing the letter to the custodian. If you judge that there is no teacher competent to assume such responsibility and it is therefore necessary for the safety and welfare of any children to keep the school closed, please keep a log of your actions. Yours is the judgment as to competency of a teacher to assume this responsibility. However, you should be prepared to justify this position on the basis of qualifications of people who did appear for duty.

2. In the event that the school cannot be opened because the custodian refuses to open the school, or is not present, call the borough custodial headquarters—as a second step, call the office of Mr. Hudson and Mr. McLaren.

/s/ Nathan Brown
NATHAN BROWN
Executive Deputy
Superintendent

DEFENDANT'S EXHIBIT C

STATEMENT OF THE PRESIDENT OF THE BOARD OF EDUCATION MR. JOHN DOAR, OCTOBER 16th, 1968 7 P.M.

The Board of Education and Superintendent of Schools, other Officers and Staff of the school system, have been acting today to bring our critical school problems to solution.

To assure that our system, partially crippled by this illegal strike, remains open and available to those administrators, teachers and students who choose to work, the Superintendent has directed all District Superintendents to open —and keep open—every school where any teachers, in fact where only one teacher, reports to work. He has directed that if only one teacher reports—in the absence of other administrators—that teacher is to be in charge of the school. While the District Superintendent may of course order the school closed against real threat to the safety of persons in or around the school, the Superintendent has made clear that this responsibility must not be used as a ruse to keep any school closed.

The Superintendent of Schools has ordered four teachers of P.S. 271 to appear at the Board of Education Headquarters for an administrative hearing concerning allegations about their recent actions in that school. Investigation of allegations against other teachers is proceeding on an emergency basis.

The Board of Education in a meeting today declared its firm intent to accept the responsibility for the maintenance of a climate within all of the schools of its system conducive to cooperative and peaceful educational processes. The Chairman of the Board appointed today a special committee of the Board which is immediately charged with putting into operation a permanent system of observation of educational environment.

PEOPLE'S EXHIBIT 1

BOARD OF EDUCATION
OF THE CITY OF NEW YORK

October 20, 1968

To: Members of the Board of Education

FROM: Bernard E. Donovan, Superintendent of Schools

It is the intention of the Board of Education to open schools wherever this can be done without danger to the welfare and safety of children. Our purpose in opening schools is to conduct a meaningful instructional program. The public is urged to have patience with District Superintendents in the opening of schools since it may be impossible to open all schools at the same time.

The Superintendent of Schools delegates to the District Superintendent the responsibility of opening or closing of schools in his district during emergency periods. In doing this he should consult with his Local School Board.

The Superintendent of Schools recommends, however, that in the opening of schools there be given adequate consideration to the provision of custodial services. In order to protect the welfare and safety of pupils, it would be advisable to open a school only if there were present one or more persons familiar with the building. This could be a custodian-engineer, a custodian, a fireman, the principal or assistant-to-principal of the school or an experienced teacher who has served a reasonably long time in the school. Until heating becomes necessary, boilers should be shut down.

Some guidelines for opening schools where the school's custodian does not appear are as follows:

1. Try to obtain key from the school principal.
2. Contact area office for:
   a) possible assistance;
   b) key to school if available.
3. District Superintendent try to obtain key from custodian or from police precinct by asking a patrolman to come with the key. (This is subject to negotiation being carried on with Commissioner Leary and based on the assumption that the custodian did not change the locks.)

   Only the District Superintendent or the school's principal or the person designated as acting principal known to the Police Precinct may arrange for a "legal" break-in by:

   a) getting a locksmith;
   b) breaking lock or window in the presence of a policeman. They will permit this only in the presence of the District Superintendent or regularly assigned principal or designated acting principal.

The following hazards must be considered if we decide to open schools without regular custodians:

"Rule 15.4 (Division of Fire Prevention)—Each fire alarm system shall be in the charge of a person holding a Certificate of Fitness issued by the Commissioner. It shall be his responsibility to observe the provisions of Rule 14, Rule 15 and Rule 23.1."

"Rule 14.1—(Division of Fire Prevention—Every fire alarm system shall be tested each morning immediately after the hours of starting work. Nor shall such system be used for any other purpose except that the daily dismissal signals may be given if authorized by the Commissioner. The use of the system for fire drill purposes may be considered a test of those parts of the system actually used."

Also:

1. Handling of water and electricity.
2. Unattended doors and intruders.
3. Night security.
4. Lunch service—hot water needed, although we could serve cold lunches if delivery trucks will get through.
5. Emergency repairs—lights, stuffed toilets.
6. Broken glass.
7. Improper lighting.
8. Heat if it should turn cold—boiler management.
9. Lack of elevator service.
10. Damage to school when windows are left open.

Under the decentralization plan the Superintendent of Schools has indicated that district superintendents may initiate charges against personnel in the district. However, the Superintendent of Schools will not accept blanket charges against teachers because of the strike, even though the strike is illegal.

Parents and other citizens have no right to break into school buildings. Parental requests should be made to the District Superintendent's office.

FILE COPY

FILED
JAN 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-926

JAMES HORELICK,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FRANK S. HOGAN
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New York County
Attorney for Respondent
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New York, New York 10013
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-926

JAMES HORELICK,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

Petitioner, James Horelick, seeks a writ of certiorari to the Court of Appeals of the State of New York, to review an order of that Court, entered June 7, 1972, affirming an order of the New York Supreme Court, Appellate Term, First Department, entered November 5, 1971, affirming a judgment of the Criminal Court of the City of New York, New York County, rendered June 18, 1970, convicting Horelick of two counts of CRIMINAL TRESPASS IN THE SEC-

ond Degree (New York Penal Law §140.10) and one count of Resisting Arrest (New York Penal Law §205.30) and sentencing him to pay fines aggregating $500 or to serve sixty days' imprisonment in lieu thereof.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Statement of the Case

Because of a labor dispute between the New York City Board of Education and the United Federation of Teachers, the principal of Washington Irving High School, in New York County, some time prior to October 17, 1968, ordered the school "closed," thus leaving the custodian and his staff in charge of the building. On October 17, 1968, the chairman of the mathematics department at Washington Irving, Edward Williams, was appointed "teacher-in-charge" of the school, by the local District Superintendent of Schools. When he was unable to persuade the custodial staff, who doubted the authenticity of his appointment, to open the building to the teachers, Mr. Williams met with several of the non-striking teachers, including the defendant, James Horelick, and discussed the prospects of surreptitiously entering the building and then compelling the admittance of the non-striking teachers.

After the discussion, James Horelick entered the building through a basement window. He was discovered, however, by a member of the custodial staff, with whom he

struggled while attempting to open the doors of the school and admit the other teachers. A police officer arrived and, when he arrested Horelick for trespassing, the defendant attempted to escape custody, and tried to kick the policeman. Later, when he was led out of the school, Mr. Horelick resumed struggling and attempted to prevent the police from placing him into a police car. A codefendant, Sandra Adickes, who was among a crowd of about sixty people that had surrounded the police car, then attempted to pull Mr. Horelick from the vehicle.

Both defendants were arrested. Mr. Horelick was charged with criminal trespass in the second degree (New York Penal Law §140.10) and resisting arrest (New York Penal Law §205.30). Ms. Adickes was charged with resisting arrest (*Ibid.*) and harassment (New York Penal Law §240.25).

In a separate incident, on October 20, 1968, at about 12:01 a.m., Horelick was again arrested after he refused the requests of the custodian and police officers to leave Washington Irving High School. As a result he was again charged with criminal trespass in the second degree.

On September 25, 1969, the defendants filed a summons and complaint in the District Court for the Southern District of New York, requesting an injunction to prevent the pending prosecution. The request was denied by Judge Ryan on December 9, 1969. The United States Court of Appeals affirmed the denial [*Adickes* v. *Leary*, 436 F.2d 540 (2d Cir. 1971)] and this Court denied a petition for certiorari. *Adickes* v. *Leary*, 404 U.S. 862 (1971).

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On the morning of September 30, 1969, the day originally set for trial, while the proceedings for the federal injunction were still pending, the defendants removed the case to the Federal District Court. The People moved for remand to the State courts and their motion was granted, effective on October 19, 1969. Both the United States Court of Appeals and this Court denied a stay of the trial on the criminal charges. *Horelick* v. *New York*, 396 U.S. 873 (1969). The Court of Appeals thereafter affirmed the order to remand [*Horelick* v. *New York*, 424 F.2d 697 (2d Cir. 1970)] and this Court denied certiorari. *Horelick* v. *New York*, 398 U.S. 939, *reh. denied*, 400 U.S. 883 (1970).

Horelick was eventually found guilty of both counts of criminal trespass and one count of resisting arrest and was acquitted of harassment. In announcing its verdict the trial court stated that it found that the high school was both legally and physically closed on October 17, 1968, that Horelick was aware of this, that the letter authorizing Williams to be "teacher-in-charge" did not authorize the opening of the school and that "in entering the school [Horelick] ran the risk and was not in a position to assert that his entry was under a claim of legal right." Petitioner was thereafter sentenced to pay fines aggregating $500 or to serve sixty days' imprisonment in lieu thereof.

In an order entered on November 5, 1971, the Supreme Court of the State of New York, Appellate Term, First Department, unanimously affirmed the judgment of conviction.

In the Court of Appeals, petitioner argued that he was privileged to enter the school and entered under a claim

of right, and that his conviction was contrary to existing procedures and amounted to an *ex post facto* law.

The New York State Court of Appeals affirmed Horelick's conviction in an opinion by Judge BREITEL, three judges dissenting. *People* v. *Horelick*, 30 N.Y.2d 453, 334 N.Y.S.2d 623, 285 N.E.2d 864 (1972). The conviction of co-defendant, Sandra Adickes, was reversed. *People* v. *Adickes*, 30 N.Y.2d 461, 334 N.Y.S.2d 629, 285 N.E.2d 868 (1972). Petitioner sought reargument in the Court of Appeals, elaborating upon his claim of an *ex post facto* interpretation of the trespass statute. On September 28, 1972, the Court of Appeals denied the motion. *People* v. *Horelick*, 31 N.Y.2d 709 (1972).

After petitioner's conviction he obtained a certificate of reasonable doubt from the State Courts. Execution of sentence was further stayed by Chief Judge FULD of the New York State Court of Appeals pending this Court's determination of the petition.

ARGUMENT

Petitioner's specious claims do not raise a substantial federal question.

The petitioner, James Horelick, seeks a writ of certiorari to review only that portion of the decision of the New York State Court of Appeals which affirmed a judgment convicting him of criminal trespass in the second degree for his forceable entry into the school on October 17, 1968. Relying upon *Bowie* v. *City of Columbia*, 378 U.S. 347 (1964), he argues that he was denied due process because the

decision of the Court of Appeals allegedly modified the interpretation of the criminal trespass statute under which petitioner was convicted to the extent that it worked an *ex post facto* change in the law and entrapped him into committing the crime. Specifically, he argues that prior to his conviction the trespass statute had not been interpreted as making the forcible entry upon property criminal, if the person so intruding was privileged to enter. Additionally he claims that he entered the school only because the Board of Education led him to believe that he was privileged to enter and that in any event he did not use force to enter the school. These claims are "so absolutely devoid of merit as to be frivolous" and do not warrant the granting of a writ of certiorari. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902); *accord, Zucht* v. *King*, 260 U.S. 174 (1922).

Judge BREITEL, writing for the Court, concluded that petitioner's guilt of criminal trespass did not depend upon whether "the school was properly closed or not" (petitioner's appendix, 4a), but rather whether Horelick had a privilege to use force to enter the building. This holding is the asserted basis for petitioner's claim of an *ex post facto* change in the law.

At the outset it should be noted that the trespass statute which petitioner was found to have violated, New York Penal Law Section 140.10, became effective September 1, 1967, only a year prior to Horelick's arrest and the New York State Court of Appeals' decision was one of the first opportunities the court had to interpret the statute. Moreover, as Judge BREITEL pointed out (petitioner's

appendix, pp. 1a-2a), the law of New York State has never permitted an individual to use force to gain access to property regardless of a claimed right to enter. *E.g.*, former New York Penal Law §2034; *People* v. *Baldwin*, 74 Misc. 384, 134 N.Y.S. 221 (Co. Ct. Erie Co. 1911). The statute under which petitioner was convicted merely continued that long-standing rule. Horelick should hardly be heard to say that he was unaware that the law precluded him from using force to enter a building from which he had been barred by both the custodian in charge and the police. This was the sort of conduct which would obviously be prohibited under any construction of the statute. *Dombrowski* v. *Pfister*, 380 U.S. 479, 491-2 (1965). And his claim that he did not use force at most raises a factual issue not warranting the granting of certiorari [*Berenzi* v. *Immigration Director*, 385 U.S. 630 (1967); *United States* v. *Johnston*, 268 U.S. 220 (1925); *Grayson* v. *Harris*, 267 U.S. 352 (1925)] and is contrary to the record which shows that he struggled with both the school custodian and the police after sneaking into the school through a window. Indeed, the Court of Appeals, noting the large number of persons at the scene and the tense situation at the time, concluded that petitioner's acts to secure and maintain his entrance into the building might have inevitably led to riot. Petitioner's appendix, p. 4a.

Moreover, petitioner's claim that he was convicted despite the fact that he entered the school with privilege and a claim of right is plainly wrong. Although the Court of Appeals felt there was no need to determine this issue, the trier of fact found that Horelick entered the school without privilege. This finding was affirmed by the Appellate Term, the highest New York court with jurisdiction to review facts. New York Criminal Procedure Law §§470.15, 470.35.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

LEWIS R. FRIEDMAN
ROBERT A. GOLDSCHLAG
Assistant District Attorneys
Of Counsel

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